No. 10877.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

APPELLANTS' OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

This is an appeal by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. and Al G. Barnes Amusement Company, both corporations organized and existing respectively under and by virtue of the laws of the states of Delaware and Indiana, respectively citizens and residents of those states, from a judgment in favor of America Olvera Pollinger, an alien, in the sum of $50,000.00 general damages and costs rendered upon a verdict after trial by jury.

The amended complaint alleges that defendants were engaged in the business of operating a circus and kindred attractions to the public at large, and that defendants

were identical in ownership, management and control; that on September 24, 1936, plaintiff and defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. entered into the written contract particularly appearing in said complaint, and that on February 20, 1937, defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc. ordered and directed plaintiff to render services thereunder to defendant Al G. Barnes Amusement Company; that on or about March 20, 1937, and pursuant to the terms thereof and the orders and directions of defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., plaintiff did render services as a balanced trapeze artist; that during the rendition of said services pursuant to the terms of said contract, defendants did provide, maintain and furnish the maintenance, setup and erection of the equipment and apparatus used by plaintiff in the performance of her act as a trapeze artist, and did so on September 12, 1937, at Anthony, Kansas; that at Anthony, Kansas, on said September 12, 1937, defendants, their servants, agents and employees, did grossly negligently and carelessly erect, maintain and set up the said equipment and apparatus so that as a direct and proximate result of said gross negligence and carelessness of defendants, and each of them, plaintiff, while rendering her services as such trapeze artist, did fall from said trapeze and was seriously and severely injured, and thus damaged in the sum of $51,000.00. [Pr. Tr. pp. 2-12.]

At the time of the second trial, the amended complaint was amended again by interlineation by the insertion of the words "grossly" and "gross" in Paragraphs VIII and IX thereof, as indicated in Pr. Tr. p. 10, line 17, to p. 11, line 5.

The answers of both defendants, appellants here, deny any negligence and/or carelessness on their part and deny that appellee has been injured or damaged in any sum or amount by reason of any act, omission, carelessness or negligence of appellants, or either of them. Defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., denies plaintiff was in its employ at the time of the accident. The answers of both defendants set up the separate corporate entity of each defendant and the separate management and different officers and directors of the two circus corporations, and further show the stock of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. to be held in a voting trust comprised of named individuals, while the stock of Al G. Barnes Amusement Company was owned by Circus City Zoological Gardens, Inc., an Indiana corporation. [Pr. Tr. pp. 16-40.] An amendment filed at the time of the second trial set up the defense of the statute of limitations as to gross negligence.

The answers of both defendants set up numerous affirmative defenses, including briefly, assumption of risk, negligence, if any, by fellow workmen, contributory negligence, fellow servant rule, contractual duty on the part of plaintiff to maintain and take care of her paraphernalia and equipment, that the fall and injury were the result of unavoidable accident, and that plaintiff contracted away liability for negligence.

The action was originally commenced in the Superior Court of the State of California, in and for the County of Los Angeles. Defendant Al G. Barnes Amusement Company appeared therein, filed a petition for removal, and the matter was thereafter duly and as by law provided for good cause removed to the United States District

Court for the Southern District of California, Central Division, pursuant to 28 U. S. C. A., section 71. After removal to the U. S. District Court, defendant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., was served with the amended complaint and appeared in the action. The statutory provision believed to sustain the jurisdiction of the District Court is 28 U. S. C. A., section 71. The statutory provision giving this Honorable Court jurisdiction on appeal to review a judgment of the District Court, is 28 U. S. C. A., section 225, paragraph (a).

The pleadings necessary to show the existence of jurisdiction are the amended complaint [Pr. Tr. p. 2], the answer of defendant Al G. Barnes Amusement Company [Pr. Tr. p. 18], the amendment to the answer of Al G. Barnes Amusement Company [Pr. Tr. p. 42], and the answer of Ringling Bros.-Barnum & Bailey Combined Shows, Inc. [Pr. Tr. p. 30.]

A judgment was first entered in the trial court for a verdict of $10,000.00 on January 30, 1940. A timely appeal was taken and this Honorable Court reversed the judgment of the trial court on May 2, 1941.

Ringling Bros. etc. v. Olvera, 119 Fed. (2d) 584.

Thereafter the case was retried before a jury and a judgment in the sum of $50,000.00 was entered on the verdict of the jury on January 15, 1944. [Pr. Tr. pp. 85-86.] Timely motions for new trial and for judgment *non obstante veredicto* were made by both defendants and

appellants and all said motions were denied respectively on March 7, 1944, and June 30, 1944. [Pr. Tr. pp. 116-117.] Timely notice of appeal was filed August 14, 1944, by each defendant. [Pr. Tr. pp. 133-134.] Bond on appeal in the sum of $62,500.00 covering both judgment and costs was filed by Ringling Bros.-Barnum & Bailey Combined Shows, Inc. on August 3, 1944. [Pr. Tr. pp. 121-132.] A cost bond on appeal in the sum of $250.00 was filed by Al G. Barnes Amusement Company on August 3, 1944. [Pr. Tr. pp. 135-137.] The record on appeal was filed with the clerk of the above entitled court and the action docketed on September 22, 1944, which was within the time allowable from the date of notice of appeal, as required by Rule 73, Rules of Civil Procedure for the District Court of the United States. The record was prepared pursuant to a designation of documents, record and proceedings to be included in record on appeal, including reporter's transcript, in accordance with Rule 75 of said Rules of Civil Procedure. This designation was filed August 30, 1944. [Pr. Tr. pp. 140-143.] A statement of the points upon which appellants intend to rely on the appeal herein, pursuant to Rule 19, subdivision 6 of the rules of this Honorable Court, was filed with the clerk September 22, 1944. [Pr. Tr. pp. 726-756.] The transcript of record was filed herein on the 22nd day of September, 1944, and by virtue of the foregoing proceedings taken within the time and as provided by the Federal Code, 28 U. S. C. A., section 230, this case is now before this Honorable Court.

Statement of the Case.

Plaintiff in this action, a woman, was an experienced professional circus trapeze artist, who had engaged in that profession from the time she was 5 years of age until the time of the accident involved in this litigation—a period approximating 25 years. She was an accomplished, proficient, and top-notch professional in the line of trapeze aerial work and knew the ins and outs of the business from start to finish. She performed for leading circuses throughout South and Central America, Europe and the United States. The apparatus itself, used by plaintiff, was fully described by her at the time of trial and was offered in evidence and is before the court as Exhibit 4. [Pr. Tr. p. 153, line 13, to p. 157, line 4.]

In 1935, in the fall, she came to the Ringling Bros. show and secured a contract with them for the 1936 season, in substantially the same language as the contract set forth in the complaint in this matter. [Pr. Tr. pp. 3-9.] She finished the season of 1936 with Ringling Bros. and in the fall of that year made a new contract with Ringling Bros. for the season of 1937, as set forth in the amended complaint in this matter. [Pr. Tr. pp. 3-9.] It was stipulated and the court entered its order approving said stipulation that said contract was made and executed in Florida. [Pr. Tr. p. 41.] When the spring circus season opened, about March, 1937, Ringling Bros. had no place for her on their show and she was referred by Pat Valdo to the Al G. Barnes show. [Pr. Tr. p. 152, line 23, to p. 153, line 12.] The evidence shows that Pat Valdo was the talent scout for the Ringling Bros. show. [Pr. Tr. p. 397, line 19.] There was no testimony adduced at the trial in regard to ownership of Ringling

Bros.-Barnum & Bailey Combined Shows, Inc., and Al G. Barnes Amusement Company. Answers of both corporations denied they were identical in ownership, management and control. [Pr. Tr. pp. 16-18.] Miss Olvera, about the time of the accident involved in this lawsuit, was able to earn in excess of $500.00 per month by reason of her skill as a trapeze artist.

Most of the time she was performing for Ringling Bros., Miss Olvera had no net, but when she came to the Barnes show she requested of Cronin, manager of the Barnes show, a net in conformity with certain description she gave. Such a net was provided and used by Blackie Williamson of the Barnes show [Pr. Tr. pp. 163-164], in conformity with Miss Olvera's instruction. This net was used for the entire season, from March to September, 1937, up to and including the very day of Miss Olvera's fall, and its dimensions were exactly as ordered by Miss Olvera. The net furnished was satisfactory to Miss Olvera. [Pr. Tr. p. 201, lines 24-25.] It was held where she directed it to be held. [Pr. Tr. p. 202, lines 2-6.] Its center was directly under appellee's trapeze when the same was stationary because that covered the largest possible area of risk of fall. The net was handled in a manner beyond criticism during the entire season and on all prior occasions, except that on the day of the fall alone they failed to catch her in it. [Pr. Tr. p. 204, line 22, to p. 205, line 14.] The net men did nothing different on the occasion of the fall than they had been doing all the season. [Pr. Tr. p. 208, line 23, to p. 209, line 12.]

On the 12th of September, 1937, Miss Olvera came in to the tent immediately preceding her act, took her customary look at the lower or trapeze bar, found it to be

exactly level and in position. [Pr. Tr. p. 221, lines 1-5.] She was accompanied by her husband, Karl Pollinger, who came in with her and went to a place near where the trapeze hung, where he took hold of a hoisting rope and assisted her in her act. [Pr. Tr. pp. 182, 196, 197, 255.] The testimony of a number of witnesses shows that both she and her husband examined the apparatus carefully before she went into the air to perform her act. [Howard Mentz, Pr. Tr. p. 514, line 22, to p. 515, line 8; Blackie Williamson, p. 466, line 15, to p. 467, line 11; Chandler Miller, p. 588, lines 21-31.]

The evidence shows that a net approximating 10 x 10 feet, with looped ropes for handles, was held by from 8 to 10 men directly under the point where Miss Olvera's trapeze was when hanging normally or naturally. [Pr. Tr. p. 168, lines 9-21, and p. 169, lines 1-27; p. 202, line 1, to p. 205, line 14.] The evidence also shows that the men holding the net and erecting the apparatus for Miss Olvera were experienced circus hands, who had long been in the circus business; that they had been with the Barnes circus for the entire circus season of 1937, and that America Olvera and her husband, Karl Pollinger, both knew all of them and knew their ability, and in fact had paid them tips in recognition of their performance and ability prior to the time of the accident. [Pr. Tr. p. 210, lines 12-24; p. 165, line 13, to p. 166, line 12.]

Miss Olvera, after finding the lower bar of the trapeze level and in order, mounted the trapeze and commenced the performance of her act, which comprised a series of balancing feats, including standing balanced on the cross bar of the trapeze while swinging the trapeze backward and forward in an arc approximating 8 feet in length, and

sideways in an arc approximately 8 feet in length. In addition to this she performed a feat of balance whereby she twisted the falls or side lines of the trapeze which ran down from the upper crane bar about 12 feet above over her shoulders by a spiral motion—in other words, she spun the trapeze around so it wound up the fall lines above her head until they came down to her shoulders and then unspun the same while balancing standing on the bar. [Pr. Tr. p. 212, line 9, to p. 214, line 26; p. 227, lines 1-21; pp. 173-175.]

Having completed these items of her act and some others, she swung forward with the assistance of her husband, who pulled the cord extending to the ground, which gave her impetus for the initial swing. [Pr. Tr. pp. 195-196.] Having swung backward and forward several times, she suddenly fell from the trapeze to the ground, about 22 feet below. She missed the net by about a foot to three feet. She was severely injured in the fall and brought this action to recover damages for her injuries. [Pr. Tr. p. 271, lines 22-23, and p. 156, lines 7-11.]

Her claims respecting alleged negligence upon which she recovered a verdict in this action were two in number: (1) That there had been gross negligence in the erection of the trapeze, and (2) that there had been gross negligence in the operation and maintaining of the net held under her, in that the men didn't move to catch her as she fell. Only the first of these claims was alleged in the amended complaint.

The specific claim respecting the negligence in the erection of the trapeze is confused. The plaintiff testifies to two separate stories on this subject, which are (1) that a certain figure eight hook, a portion of the apparatus

in evidence as Plaintiff's Exhibit 2 in this matter, and the clevis hook on the crane bar, had either become tangled up when the trapeze was first erected in the tent, or (2) became so tangled up during the course of her performance, and when she made her last forward swing her trapeze snapped down from 5 to 6 inches [Pr. Tr. p. 226, lines 16-19], threw her out of balance, and tossed her out of the front of the trapeze as she was about to stand up to make the final gesture in her act. [Pr. Tr. p. 225, line 22, to p. 227, line 21, as to first interpretation; Pr. Tr. p. 175, lines 18-31, as to second interpretation.] Which of these two claims was true we, of course, have no way of knowing. She herself later said she didn't know. [Pr. Tr. p. 215, lines 9-12.]

The testimony shows that the trapeze swung backwards and forwards normally and without swinging from side to side or pulling over, one side being ahead of the other at no time during the several minutes preceding her fall that she performed other phases of the act. [Pr. Tr. p. 222, line 1, to p. 227, line 21.] Miss Olvera, though at various times during her testimony claiming that the figure eight hook remained tangled up during all the portion of her act performed, including the spinning of the fall lines, the winding up of the same, and the swinging of the same forwards and sideways prior to the last of her act, admitted that she did not know exactly when the figure eight hook became overlapped [Pr. Tr. p. 215, lines 9-12], unless it was when she looked up and actually saw it overlapping just before it came loose. [Pr. Tr. p. 175, lines, 19-31.]

The second claim of gross negligence offered and accepted over appellants' objection and not pleaded in her

amended complaint, is that the men who held the net did not move or try to move or catch her after she fell. She was 22 feet in the air when she fell and she fell about 1 to 3 feet beyond the net. Plaintiff now claims that it was negligence on the part of both defendant circuses that the men holding the net did not run over and catch her as she was falling through the air. The net used was the identical net she herself had prescribed [Pr. Tr. p. 201, lines 16-31], and the testimony showed it was dead center underneath the trapeze at the time of the accident, as directed by her. [Pr. Tr. p. 202, lines 2-6; p. 204, line 22, to p. 205, line 14.]

Miss Olvera was performing for the Barnes circus at the time of her fall. She had been sent to the Barnes circus by Pat Valdo by virtue of the correspondence and under the contract she had with Ringling Bros.

The Barnes show was a separate corporation, with separate directors and officers, and it had a separate manager. Ringling Bros. had its own individual directors, officers and managers. [Pr. Tr. pp. 17-18.] The two shows were not in any way combined but were separate circuses and shows and each a complete entity itself. The Barnes show paid Miss Olvera's salary, directed her actions and acts, and had complete and full supervision over her through Mr. Cronin, its manager. The Ringling Bros. show in no way controlled, directed, paid salaries of or had any control over the employees and individuals representing and working for the Barnes circus. [Pr. Tr. p. 399.]

The plaintiff charges that both defendants were grossly negligent and careless in the erection, maintenance and setting up of her equipment on September 12, 1937; that

as a direct and proximate result of said negligence and carelessness she fell from her trapeze on said day and was severely injured. This claim is denied by both appellants, and it is charged by both appellants that the appellee was guilty of contributory negligence and assumed the risk and hazards of her occupation in using the trapeze and equipment referred to; that the fall was an unavoidable accident; that she had contracted away her right to sue for negligence if there was any existent, and that she was required to maintain, erect and set up her own equipment safely.

In the appeal resultant from the first trial in this case, this Honorable Court reversed the judgment, the trial court having refused to instruct on gross negligence. The second trial, from which this appeal is taken, resulted in extended inquiry on the subject of both claims of gross negligence above indicated, to the end that there could be nothing left to inference. The testimony along this line is contained in Pr. Tr. pp. 201 to 205 and pp. 208 to 210, as to the subject of the net, and as to the subject of the erection of the trapeze, pp. 216 to 227, inclusive, adopting alone for the purpose of the foregoing statement the testimony of plaintiff herself.

Although the amended complaint had no allegation concerning gross negligence in it, over objection and in the face of an amendment to the answer setting up the statute of limitations, amendments by interlineation were allowed. [Pr. Tr. p. 372.] There was no evidence of gross negligence or from which gross negligence could be inferred at the time of the trial. Although the trial court indulged in some colloquy on the subject [Pr. Tr. p. 219]

and informed the jury to the contrary, and although plaintiff repeatedly testified that Pollinger did not assist in the erection of the trapeze, other witnesses did testify that he participated in the erection of the trapeze. [Howard Mentz, Pr. Tr. pp. 511-512; Chandler Miller, Pr. Tr. p. 588, line 20, to 591, line 17; Robert Thornton, Pr. Tr. pp. 437-439; George Williamson, Pr. Tr. pp. 556-560, and Philip Labay, Pr. Tr. p. 466.] And the plaintiff herself twice referred to this fact. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20.]

Appellants were not lawfully informed in the amended pleading or otherwise until the actual trial was on, that any claim was made respecting the negligent use and operation of a net designed, according to the claim of appellee, to cach the appellee when and if she fell from her trapeze. The negligence charged in the amended complaint was negligence in the erection, maintenance and setting up of her equipment. Her equipment, according to the evidence and plaintiff's own testimony, did not include a net, and therefore there was no charge in the pleadings that appellants negligently maintained or operated a net. Evidence concerning the net was introduced over the repeated objection of appellants. [Pr. Tr. pp. 163, 169.] Erroneous instructions were also given involving the subject of the net [Pr. Tr. pp. 56-60, incl.], over objections by appellants.

A variance between the pleading and proof occurred when, without any pleading to that effect and in the teeth

of an allegation that the plaintiff was performing in conformity with the identical terms of a certain written contract specifically set forth in the complaint at the time of the accident [Pr. Tr. pp. 3 to 9], evidence was admitted and instructions given to the effect that there was a modification of the contract to the extent that a net was provided and used without requiring the supervision and direction called for under the contract on the part of plaintiff. In this particular the effect of the court's instruction 14-a, read by the court to the jury and a copy thereof provided counsel for the defendants only after the jury had gone out [Pr. Tr. pp. 719-720] was particularly damaging. Besides being an erroneous expression of the law and a formula instruction not containing all defenses alleged, this instruction reopened the entire case on the subject of modification of the contract and in effect brought about a trial of the issues on ordinary negligence in the handling of the net. That instruction made the net construed as an item which was not subject to the limitation of liability clause in the contract. That the jury so took it, it is very apparent. The giving of that instruction in the manner in which it was given, deprived defendants of an opportunity to reoffer instructions theretofore withdrawn on the subject of master and servant [Pr. Tr. pp. 105 to 110], and likewise entitled the defendants to the giving of several instructions on master and servant that remained in the record, notably defendants' Instructions Nos. 10, 21, 29. [Pr. Tr. pp. 67-68-71-72-77.]

The court also denied the appellants' motions for nonsuit, for directed verdict, for judgment *non obstante veredicto,* and for a new trial, though this point was raised at the time said motions were presented.

The pleadings and the evidence, and the ruling of the court, established the fact that the appellee was an independent contractor. [Pr. Tr. p. 153, lines 9-12.] Under her contract [Pr. Tr. pp. 3-9] she assumed the risks and hazards of her employment and her act as a trapeze artist in general and thus the consequences resultant in this case. In this matter the court refused to give certain instructions [Pr. Tr. pp. 62, 65, 66, 70, 72] instructing the jury on this subject, denied appellants' motions for nonsuit, directed verdict, judgment *non obstante veredicto,* and for new trial, in all of which motions appellants raised this point.

In this case there was a duty imposed by contract upon appellee to inspect and supervise the erection of her apparatus, in the discharge of which she admittedly failed. The testimony of plaintiff disclosed that on the day in question she failed to inspect her apparatus. She owed this duty under the terms of her contract set forth in the amended complaint in this action, and failed to exercise that duty. [Pr. Tr. p. 212, lines 9-22.] The court erred in giving instructions to the jury pertaining to the subject of this duty and in refusing to give other instructions requested upon this subject. [Pr. Tr. pp. 56-58, 61-68, 70-72, 77, 79, 80.]

Specifications of Error Relied Upon.

I.

The District Court erred:

(a) In denying appellant Al G. Barnes Amusement Company's motion to dismiss the amended complaint.

(b) In denying appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.'s motion to dismiss the amended complaint.

(c) In overruling appellants' objections to the introduction of evidence.

(d) In overruling appellants' motions for nonsuit.

(e) In denying appellants' requests for directed verdict.

(f) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto.*

(g) In denying appellants' motions for a new trial.

On the grounds that the appellee's amended complaint does not state facts sufficient to constitute a cause of action against these appellants in this: That said amended complaint sets forth a contract between appellee and appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., which contains a clause releasing said appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc., from any liability for damages which might occur to appellee in carrying out the provisions of the contract and providing that the relationship between the parties was that of independent contractor; that the terms of the contract and the relationship of the parties relieved appellants of any liability whatsoever; that the verdict impaired the obligation of contract, thus violating the constitutional rights of appellants.

II.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' requests for directed verdict.

(c) In failing to give appellants' Instructions Nos. 9-a, 32 and 33, reading respectively as follows:

> "The elemental idea of 'negligence' is failure or omission — the failure or omission to do something which should have been done. Negligence that is 'gross' involves the additional and affirmative element of intent to do or wilfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness." [Appellants' Instruction 9-a.]

> "Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case." [Appellants' Instruction 32.]

> " 'Wilful and wanton misconduct' is such conduct as amounts to an intentional wrong or of such a

reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons." [Appellants' Instruction 33.]

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto.*

On the grounds that there was neither adequate allegation in appellee's amended complaint nor adequate proof adduced at the trial to support the verdict charging the appellants with gross or any other negligence and for the further reason that the purported amendment to the complaint inserting certain language which occurred while the case was on trial, was improper and any claim for gross negligence was barred by the statute of limitations, being the provisions of Part 2, Title 2, Chapter #3 of the California C. C. P., and in particular section 340 thereof.

III.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' motions for directed verdict.

(c) In refusing to give appellants' requested instructions on the subject of gross negligence or wilful misconduct, being appellants' instructions Nos. 9-a, 32 and 33.

(d) In giving of its own motion under the caption of plaintiff's instruction 14-a, the instruction which in effect instructed the jury to find for the appellee and against the appellants if, for any cause whatsoever, the appellants failed to catch the appellee in the net, and which said instruction, being a formula instruction, failed to include all of the affirmative defenses set up in appellants' answers, notably the defenses of fellow servant, assumption of risk, unavoidable accident, failure to inspect, and neglect of her own duties under contract.

(e) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto.*

(f) In denying appellants' motions for a new trial.

On the grounds that under the contract by which appellee was employed, appellee waived any action for damages on account of ordinary negligence of appellants. By giving instruction No. 14-a the court in effect abrogated the terms and conditions of the contract and by admitting evidence that a net was used as a part of the apparatus and that it was under the supervision and control of appellants, it abrogated the terms of the contract, made a modification thereof, and upon such modification allowed and directed a verdict in the event of ordinary negligence, or in fact in the event of the mere failure for any cause to catch appellee in the net. Further, in giving said formula instruction the court failed to include all the defenses affirmatively pleaded in appellants' answers as they applied to any possible claim of negligence of appellants.

IV.

The District Court erred:

(a) In overruling appellants' motions for nonsuit.

(b) In refusing to give the following instructions:

Defendants' instructions Nos. 8, 20 and 21, reading as follows:

> "You are instructed that the plaintiff in her contract with Ringling Brothers-Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants." [Defendants' Instruction 8.]

> "If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants." [Defendants' Instruction 20.]

> "If you find that plaintiff herein complained some time prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the em-

ployer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect." [Defendants' Instruction 21.]

(c) In denying both appellants' requests for a directed verdict.

(d) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto.*

(e) In denying appellants' motions for a new trial.

On the grounds that appellee under her contract and as an independent contractor, assumed the risks and hazards of her employment and her act as a trapeze artist in general.

V.

The District Court erred:

(a) In allowing evidence to be given over appellants' objections as to the construction and operation of the net.

(b) In instructing the jury concerning the operation of a net as follows:

"If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspecton on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the main-

tenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

"If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows." [Plaintiff's Instruction 14-a.]

(c) In refusing to give defendants' proposed instruction No. 5, reading as follows:

"And if you find there was a defect in the apparatus used by plaintiff at the time of her accident and this defect was in the knowledge of defendants and that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, even if you find such defect was the proximate cause of the injuries complained of you will find for the defendants." [Defendants' Instruction 5.]

(d) In denying appellants' motions for a new trial.

On the grounds that appellee charges no negligence in her amended complaint in relation to a net, and no net is mentioned in the contract of employment, whereas the court allowed evidence over appellants' objection concerning the construction and operation of a net; that in opening up this field by allowing the evidence and instructing as the Court instructed in Instruction 14-a, the jury was

directed to find in favor of the appellee even though no gross negligence was shown in so far as the operation of the net was concerned, on account of the fact that the modification of the contract by the court resultant, relieved the appellee of her contracts against liability as to even ordinary negligence on the part of appellants, without any pleadings of modification.

VI.

The District Court erred:

(a) In refusing to give the following instructions requested by appellants on the subject of master and servant:

> "The Court instructs you that it is an admitted fact that the accident in question occurred on the 12th day of September, 1937, at the City of Anthony, State of Kansas, and therefore the law of the State of Kansas will prevail will be your guide in your deliberation on the issues presented, and the Court will further instruct as to the application of the law of Kansas on the question of gross negligence and other issues presented." [Defendants' Instruction 10.]
>
> "If you find that plaintiff herein complained some time prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an

unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect." [Defendants' Instruction 21.]

"You are hereby instructed that the plaintiff America Olvera, can maintain no action against the defendants for damages sustained, if you find that said damages or injuries were sustained solely through the negligence of a fellow employee or fellow employees." [Defendants' Instruction 29.]

(b) In prohibiting appellants from an opportunity to examine instruction 14-a before the same was read and before the jury was sent out to deliberate, in that manner prohibiting appellants an opportunity of re-offering certain instructions on the subject of master and servant in addition to those set forth in (a) *supra,* under the facts and circumstances as set forth in the affidavit of Lee Combs in support of the motion for a new trial herein, said instructions being attached as exhibit to said motion for new trial.

(c) In refusing to give instructions requested by appellants defining the duty of appellee under her contract to inspect and supervise the erection of her apparatus, being

in particular appellants' proposed instructions Nos. 3, 4, 6, 8, 20 and 21:

> "I further instruct you that if you find there was a defect in the apparatus used by plaintiff which was the proximate cause of her injuries, and that said defect was within the knowledge of defendant but that plaintiff also knew of such defect or could have known of such defect by the exercise of ordinary care and prudence on her part, you will find for the defendants." [Defendants' Instruction 3.]

> "I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at the time of her accident and there was a defect in said apparatus which was the proximate cause of her injury, and plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants." [Defendants' Instruction 4.]

> "If you find that the plaintiff, America Olvera, contracted by written contract to furnish a 'specialty act' in her customary manner for the defendant circus, and that the act had been prepared and arranged by plaintiff, and that defendants did not have the right to control the character of said act or the paraphernalia to be used in said act, I instruct you that you must find that plaintiff was acting at the time of the accident as an independent contractor and her employers were acting as contractees." [Defendants' Instruction 6.]

"You are instructed that the plaintiff in her contract with Ringling Brothers-Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants." [Defendants' Instruction 8.]

"If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risks incident thereto and can not recover from the defendants." [Defendants' Instruction 20.]

"If you find that plaintiff herein complained some time prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows

is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect." [Defendants' Instruction 21.]

On the grounds that the Court instructed the jury that the appellee was an independent contractor and appellants independent contractees, and that the contract imposed a duty upon said appellee to inspect and supervise the erection of her apparatus, in which she admittedly failed, and on the further ground that the law as applied by the Court through instruction 14-a and the admission of evidence concerning the net, abrogated the independent contractor theory and in effect directed the jury to bring in a verdict for appellee on a finding of ordinary or no negligence at all, under a formula instruction.

VII.

The District Court erred:

(a) In denying appellants' motion for directed verdict.

(b) In overruling appellants' motion for nonsuit.

(c) In denying appellants' motions to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto.*

(d) In denying appellants' motions for a new trial.

(e) In refusing to give the following instruction:

"The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair

and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence and the facts and to the instructions of the court for the law of the cases, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant." [Defendants' Instruction 19.]

(f) In permitting counsel for the appellee to make the following statements to the jury during his argument in relation to the depositions shown to have been taken in a legal matter, and concerning the appellants' conduct toward appellee:

"That is, the questions are written down, sent back there, and they have an opportunity of going through them and answering them, without the presence, as was the case in this matter, of the plaintiff being represented by counsel." [Rep. Tr., p. 593, lines 9-13.]

"It is obviously an out and out violation of their oaths." [Rep. Tr., p. 595, lines 1-2.]

"Let us get down to the direct facts in this case. What are we predicating our case upon? What has happened here? Here is a lady in the prime of life, who went to work for the largest circus in the world, she being the feature attraction for this company, this company which had waxed rich and powerful and mighty upon the performances and ability of people like Miss America Olvera." [Rep. Tr., p. 595, lines 3-9.]

"This is a printed contract that was given to her by Ringling Bros. Barnum & Bailey Combined Shows. This is one of those contracts, that you can take it or leave it." [Rep. Tr., p. 595, lines 22-25.]

"It's furnished to them; it's given to them, and they are told to put their signature to it, and that's that." [Rep. Tr., p. 596, lines 11-12.]

"They provided a net for her. That net was held by the employees of the circus. What was the purpose of the net? I believe the court asked that of the witness Miller: What was the purpose of that net? Was it to catch her in safety—Yes. Now, was that done in this case? No." [Rep. Tr. p. 596, lines 19-24.]

"We have the testimony of Mr. Williamson, the supervisor. He said he had a most excellent crew, who had been with him for a long time. He was not with the circus any more. Mr. Cronin is not there any more. That's why I think you got the truth from this man." [Rep. Tr. p. 598, lines 5-10.]

"Here is a lady that has given the best part of her life to the rendition of her services for this company. * * * You give the best that's in you. You give your life, or your services, and what do you get in the end? Probably just an empty life." [Rep.. Tr., p. 598, line 22, to p. 599, line 4.]

"Do you want any money? If you do you work for it. Well, work how? Did they provide her with at least medical attention? Did they give her the means or ability to go out and get this money? No, they didn't." [Rep. Tr., p. 600, lines 1-4.]

"Gentlemen, you have probably reached the conclusion that there was a previous trial in this case, and there was. It's in the record. And there is another trial now; and don't you think we don't have to do everything in our power, our legal power, to convince this circus here that they ought to take care

of people who have rendered their services to them, and have given of their life." [Rep. Tr., p. 600, lines 18-24.]

"Gentlemen of the jury, you have been very patient and very kind to me. I hope you will be kind to my client." [Rep. Tr. p. 601, lines 23-24.]

"He says: We are a mighty corporation. We are the greatest circus in the world, and she was working for the next to the largest circus in the world. And who made that circus? Does the name Ringling, or Barnum & Bailey, or Barnes, mean anything alone without people like Olvera and like other performers? They made that circus; they made the circus what it is. They risk their lives every day, under the terms of that vicious contract which says: You take it or leave it." [Rep. Tr., p. 628, lines 18-26.]

"And counsel very dramatically says: Take it or leave it, because if you don't, and the contract is in some other form, whereby we assume some of your risk, you have got to take to earn the few paltry dollars you earn per week, it might break us. Those are his words." [Rep. Tr., p. 628, lines 26, to p. 629, line 5.]

"Do you know why they put 'independent contractor' in that agreement, that printed contract? Counsel knows, and I know. He says there is no relationship of master and servant. No, there isn't. Why? Because he knows we would not be in this court; there would't be any lawsuit if there was a relation of master and servant. The Industrial Accident would have taken jurisdiction of this case, and then we would have been compensated for her services, regardless of negligence, regardless of contributory negligence, or gross negligence. She would

have been paid. This vicious contract, that was printed and delivered to her, it says 'Independent Contractor Agreement.' Independent for Ringling Bros. Circus. And that's the reason why they put that on there." [Rep. Tr., p. 629, lines 6-19.]

"If she has shed tears, it is because she has got to fight for everything she has got, and, gentlemen, God only knows this means everything in the world to her. She has waited a long time for it. If she has waxed a wee bit dramatic because of it, it has come from the sincerity of her soul." [Rep. Tr., p. 634, line 23, to p. 635, line 2.]

On the grounds that the remarks above quoted and other remarks, the failure to give the instructions, and the conduct of the trial court, resulted in a bias and prejudice against appellants and an unfair trial to them, so gress that it could never be repaired by any direction or instruction of the court.

VIII.

The District Court erred:

(a) In denying appellants' motions to set aside the verdict for appellee and to enter a judgment in favor of appellants and for judgment *non obstante veredicto.*

(b) In denying appellants' motion for a new trial.

On the grounds that the damages in this case are excessive in that the evidence fails to show any measure of appellee's earning power or how long she might have continued as a trapeze artist, and fails to show the extent of the injury as sufficient to support said verdict, and fails to show that appellee suffered any permanent disability for any other reason than her own refusal to submit

to proper and adequate and recognized medical treatment at the time she first suffered her injury.

IX.

The District Court erred:

(a) In denying appellants' motions for nonsuit.

(b) In denying appellants' motions for directed verdict.

(c) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment *non obstante veredicto.*

(d) In denying appellants' motions for a new trial.

On the grounds that there is no evidence in the entire record supporting the claim or from which it might be inferred that any gross negligence occurred in this case, either in the operation, management, erection or use of the trapeze or of the net involved in this case, and that the facts in this case do not support the verdict.

X.

The District Court erred:

(a) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment *non obstante veredicto.*

(b) In denying appellants' motions for a new trial.

On the grounds that the court during the course of the trial made remarks prejudicial to appellants in the presence of and to the jury which affected and influenced the jury and created an attitude of bias and prejudice against appellants. Some of said remrks comprise the following:

> "She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't mean

an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?" [Rep. Tr., p. 16, lines 14-19.]

"This is a very important phase of the case." [Rep. Tr., p. 17, line 9.]

"You don't mean that a gift was made of the net?" [Rep. Tr., p. 23, lines 18-19.]

"Maybe she does not understand the word 'establish'." [Rep. Tr. p. 30, lines 14-15.]

"I think you had better do that. I think she might have some difficulty, because of her lack of knowledge of the language." [Rep. Tr., p. 32, lines 20-22.]

"However, this seems to be preliminary." [Rep. Tr., p. 37, line 20.]

"I think she has explained very thoroughly what constitutes her act." [Rep. Tr., p. 38, lines 23-24.]

"She said the net was too heavy." [Rep. Tr. p. 63, line 17.]

"The Court: In that position the outer edge of the net would be about eight or ten inches from your body.

Mr. Combs: It would depend on the length of the forearm.

The Court: I am looking at you." [Rep. Tr., p. 71, lines 2-5.]

"The Court: I don't believe it would be a foot from the front of the net.

Mr. Combs: From my body to the net, isn't that right?

The Court: Anyway, they held the net out in front of them.

Mr. Combs: This looks to me like it was about 18 inches.

The Court: It isn't important.

Mr. Combs: Let us get it right. One foot to this point, and an additional four inches to the end of my finger.

The Court: You are getting your hands a little more extended.

Mr. Combs: It looks to me like it was about 18 inches, anyway.

The Court: It looks to the court less than a foot.

Mr. Combs: Let us get it exactly right, because I wouldn't want the record to show that, Your Honor, because I think that is an important part in this lawsuit.

The Court: Mr. Marcus, go up and help Mr. Combs.

Mr. Combs: Have you got it? Put the measure on my body next to the elbow bone.

Mr. Marcus: What does the record show with reference to where the measurement is to be taken on your body?

Mr. Combs: The end of my elbow. Do you feel that? This is the end of the elbow.

Mr. Marcus: I am asking about the record; where is it to be taken from?

The Court: Help Mr. Combs to take any measurement he wants. See how long his elbow is.

Mr. Combs: From my elbow bone to the end of my wrist is one foot, is it not?

Mr. Marcus: Yes.

Mr. Combs: Correct, counsel?

Mr. Combs: Will you measure from my wrist out to where these fingers? I will put the hand as tightly together as I can.

Mr. Marcus: Four inches.

The Court: Measure from that part to the front of his body." [Rep. Tr., p. 71, line 25, to p. 73, line 12.]

"You are referring to your right shoulder." [Rep. Tr., p. 74, line 18.]

"You changed around to your left shoulder." [Rep. Tr., p. 74, line 21.]

"You don't know whether it was the right shoulder?" [Rep. Tr., p. 74, lines 24-25.]

"You may read it. The reading of it should not have any weight, because the court's ruling would be that it was not at variance with her testimony here; but for the purpose of the record you may read it." [Rep. Tr., p. 98, lines 9-12.]

"Mr. Marcus, because of the court's knowledge from the preceding trial, I think it might be explained that Mr. Pollinger had a strong man act, because he speaks about coming in and pulling her up." [Rep. Tr., p. 128, lines 14-17.]

"He has already said he heard a metallic noise; something striking metal." [Rep. Tr., p. 134, line 26, to p. 135, line 1.]

"I don't think you need answer that question. It is a rule of physics." [Rep. Tr., p. 146, lines 13-14.]

"The Court: Don't argue with the witness.

Mr. Combs: I am just trying to bring my case out in a fair and proper manner.

The Court: You have a right to bring your case out, but bear in mind the admonition of the court." [Rep. Tr., p. 147, lines 17-21.]

"Don't answer that. The court will limit the cross-examination on that point. [Rep. Tr. p. 149, lines 17-18.]

"No, he asked you in feet about how high the crane bar was. You don't have to be accurate; unless you know definitely, say approximately." [Rep. Tr., p. 153, lines 22-24.]

"Mr. Comb, it would appear to the court this is an important matter, and I think you should bear in mind the rule in regard to leading questions." [Rep. Tr., p. 272, lines 14-16.]

"I don't think it is material. The motion will be denied." [Rep. Tr., p. 333, lines 17-18.]

"The Court: It has been stipulated that it is correct.

Q. By Mr. Marcus: Is that your testimony?

The Court: It has been stipulated that he was asked those questions, and he gave those answers.

Mr. Marcus: I want to follow it up, to determine whether that answer he gave is true.

Mr. Combs: It is argumentative, Your Honor.

Mr. Marcus: It is a part of the impeachment.

The Court: I think he has a right to ask whether or not the testimony he is now giving is correct and accurate, or whether the testimony given at the other trial was correct.

Mr. Combs: That assumes a fact not in evidence. If there appears to be any conflict the witness has a right likewise to explain his answers. I think the question is argumentative, and I object to it upon that ground.

The Court: Reframe your question, Mr. Marcus.

Q. By Mr. Marcus: Mr. Thornton, is the testimony that you gave today true, or the answers that you gave in response to the questions of the court at the last trial true?

Mr. Combs: That is objected to as argumentative. That assumes that there is a difference between the two.

The Court: It must assume that there is a difference, or it would not be a proper question.

Mr. Combs: I don't think the question is proper, Your Honor.

The Court: As I recall his testimony now he stated that when Mr. Pollinger came into the ring he did certain things with reference to the apparatus; that he showed the property men, or riggers, how the trapeze should be arranged, and that he gave them some direction regarding the guy ropes; that when it had reached a certain position he held up his hand, and told them it was correct. That is my recollection of his testimony.

Mr. Combs: Yes, that is my understanding of his testimony, Your Honor.

The Court: And the part of the record that was read by Mr. Marcus was that he did not remember that he did anything, as I recollect it. I think perhaps the discussion of this had better be in the absence of the jury, and the court will order the jury to retire from the courtroom, and that they bear in

mind the admonition of the court and return when called by the bailiff." [Rep. Tr. p. 347, line 20, to p. 349, line 10.]

"Mr. Marcus: I object to that as calling for a conclusion.

The Court: Yes, it does. On such an important matter, there should not be any conclusion." [Rep. Tr., p. 500, lines 10-12.]

"Just state what you saw him do, or heard him say, if anything; not your conclusion as to what he was doing, Mr. Miller. It is very difficult for a witness to understand it, and you may have some difficulty." [Rep. Tr., p. 500, lines 18-21.]

"No, Mr. Combs, that is what he is attempting to explain." [Rep. Tr., p. 514, lines 26, to p. 515, line 1.]

"He means, have you placed it on the diagram? Was there anything else except that flying act you have referred to, above her rigging, or within the distance between the two center poles?" [Rep. Tr., p. 520, lines 10-13.]

"Do the best you can, Mr. Miller." [Rep. Tr., p. 521, line 13.]

"He said he did not remember, Mr. Marcus." [Rep. Tr., p. 527, line 2.]

"There is no use asking him the question again. He just said he did not remember it." [Rep. Tr., p. 527, lines 4-5.]

"It is not necessary to rebut it under such circumstances." [Rep. Tr., p. 575, lines 24-25.]

XI.

The District Court erred:

(a) In denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants, and for judgment *non obstante veredicto.*

(b) In denying appellants' motion for a new trial.

(c) In admitting answers to questions concerning conversation in an attempted impeachment of Chandler Miller.

On the grounds that the Court allowed extended inquiry of witness Chandler Miller concerning an alleged conversation with appellee in which over objection, appellee's counsel recited a purported and erroneous summary of said conversation [Rep. Tr., p. 560, line 2, to p. 562, line 23], reiterated same with appellee [Rep. Tr., p. 571, line 20, to p. 575, line 25], which was followed by the comment by the Court: "It is not necessary to rebut it under such circumstances." Through the statements of counsel over objection, and the comments of the Court, the witness was improperly discredited before the jury.

The District Court erred:

(a) In refusing the motion to strike in the following matter:

> "Q. But is it during all of the performances of the other acts before you? A. No. sir, because

some of the other acts needs a place to hang the other rigging. They hang other rigging in the same place, so to tell you when my trapeze exactly goes up, I wouldn't be able. I don't have nothing to do with it.

Q. Who brings your rigging up into position?

Mr. Combs: I move to strike out "I don't have nothing to do with it," as a conclusion of the witness.

The Court: Denied." [Rep. Tr., p. 39, lines 17-26.]

(b) In refusing to permit answers to the following questions:

"Q. I presume the second second she fell, however, she did fall at the regular accurate rule of physics?

The Court: Don't answer that. The court will limit the cross-examination on that point." [Rep. Tr. p. 149, lines 15-18.]

"Q. How long would you say it took your wife to fall from the trapeze bar to the ground?

The Court: I don't think you need answer that question. It is a rule of physics." [Rep. Tr., p. 146, lines 11-14.]

"Q. By Mr. Marcus: If an examination disclosed there was an anesthesia in the right leg of Miss Alvera, would that indicate anything to you, Doctor, from the X-ray?

Mr. Combs: That is objected to as not a complete statement of the facts: assuming facts not in evidence; not a complete statement of the facts in evidence or sufficient upon which to base a hypothetical question.

The Court: It is only to a certain portion of the right leg. The anesthesia did not appear on all the surface.

Q. By Mr. Marcus: In certain parts of the right leg, would that indicate anything from an examination of this X-ray?

Mr. Combs: Same objection; incompetent, irrelevant and immaterial; no proper foundation laid.

The Court: Overruled. You may answer.

A. In cases of this nature, where there are areas of anesthesia below the site of the injury it is commonly considered that the injury has involved to some degree some of the roots of the major nerves leaving the spinal column in the site of the injury, and, therefore, the clinical evidence furnished by the neurologist's examination, coupled with the visual evidence of injury, constitutes a basis for the diagnosis of definite injury involving the nerve trunk—nerve roots, rather.

Mr. Combs: I ask that the answer be stricken upon the ground that no proper foundation has been laid. The question assumes facts not in evidence.

The Court: Motion denied." [Rep. Tr., p. 216, line 25, to p. 217, line 26.]

SUMMARY OF ARGUMENT.

1.

There is no evidence of gross negligence or of wilful misconduct sufficient to support the verdict in this case.

2.

The so-called plaintiff's instruction 14-a given by the Court. was erroneous in that it was a formula instruction omitting defenses pleaded and abrogating contractual rights of the parties, and was incoherent and unintelligible.

3.

The contractees (defendants) under the circumstances violated no duty owed plaintiff in regard to either premises or appliances, and consequently could not have been guilty of negligence of any kind.

4.

Where there is a contractual assumption of risk, any defects in apparatus should have been observed by plaintiff under her contractual duty to inspect, and lack of inspection should relieve defendants from responsibility.

5.

Contributory negligence was established as a matter of law in this case.

6.

The verdict deprives the defendants of the protection afforded by the Constitution of the United States.

7.

In comments and rulings of the Court and counsel in the presence of the jury, a bias and prejudice was created against defendants which resulted in an excessive verdict.

ARGUMENT.

POINT I.

There Is No Evidence of Gross Negligence or of Wilful Misconduct Sufficient to Support the Verdict in This Case.

It has already been determined by your Honorable Court in a previous appeal of this case (*Ringling Bros.-Barnum & Bailey Combined Shows, Inc., a Corporation, Appellant, vs. America Olvera, etc., Appellees,* 119 Fed. (2d) 584) that only upon a showing of gross negligence proximately causing her injuries could the appellee America Olvera recover against the appellants. This decision was made under the terms of a contract existing between the appellee America Olvera and appellants.

This point having already been decided, we shall spend no further time on it in this brief. It is our contention, however, that in the trial of this cause there was no evidence whatever which would support a charge of gross negligence upon the part of appellants or their employees.

(a) Review of Law on Gross Negligence and Wilful Misconduct.

The law on gross negligence and what is sufficient to constitute the same we can briefly review as follows:

Gross negligence has been defined and distinguished from "wilful misconduct" and "ordinary negligence" a great number of times by the courts of California. We submit the definition given in *Krause v. Rarity,* 293 Pac. 62, 210 Cal. 644, 77 A.L.R. 1327 (from which case one

of the defendants' requested instruction herein was taken). It reads as follows:

> "In this state the degrees of negligence have been frequently recognized. The term 'gross negligence' has been defined as 'the want of slight diligence,' as 'an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others,' and as 'that want of care which would raise a presumption of the conscious indifference to consequences.'"

Krause v. Rarity, 293 Pac. 62, 210 Cal. 644 at 655;

See also:

Walker v. Bacon, 23 Pac. (2d) 520 (Cal.):

Olson v. Gay, 27 Pac. (2d) (Cal.) 922.

The court in *Cal. & Hawaiian Sugar Refining Co. v. Harris County Huston Ship Channel Navigation Dist.*, 27 Fed. (2d) 392, in answering plaintiff's contention that there is no distinction between gross negligence and ordinary negligence, said:

> "With plaintiff's effort in this regard, I do not agree for I think there inheres in the term 'gross negligence' as expanded and applied by the courts in the past, a clear and certain meaning and that the distinction sought to be made between gross and simple negligence is in itself a distinction grounded upon public policy. (Citing 4 A.L.R. 1186.) I am, therefore, of the opinion that the doctrine laid down in Interstate C. Co. v. Agnew (C.C.A.), 255 Fed. 508, is a correct statement of the law and if the defendant has made a contract with the plaintiffs against the results of its negligence, that this must

be held valid and the proof in this case failing to establish more than negligence, the defendant would have to be held exonerated."

Cal. & Hawaiian Sugar etc. Co. v. Harris County etc. Dist., 27 Fed. (2d) 392.

The lack of pleading gross negligence or facts which would constitute gross negligence, was urged upon the District Court by defendants on their motion to dismiss the amended complaint, as not stating a legal claim upon which relief could be granted. That this was a fatal defect under the laws of California (forum), we submit the following authorities:

"It has been stated that a complaint which avers that a defendant wrongfully and negligently did a certain act, does not state a cause of action for gross negligence."

19 *Cal. Jur.* 676, Sec. 100, Point 11.

The authority cited for this statement is

Michalitschke Bros. v. Wells, Fargo & Co., 50 Pac. 847, 118 Cal. 683,

And the court held that

"A complaint averring merely that the defendant 'wrongfully and negligently failed to deliver' certain packages committed to it as a common carrier, does not show that the loss occurred through 'gross negligence' within the meaning of section 2175 of the Civil Code."

Michalitschke Bros. v. Wells, Fargo & Co., 50 Pac. 847, 118 Cal. 683.

This case now constitutes the said law on pleading gross negligence in California.

The case of *Nichols v. Smith*, 28 Pac. (2d) 693, 136 Cal. App. 272, is authority not only on this point of pleading but also on the necessity of instructing the jury as to gross negligence. The language used by the court is as follows:

> "Respondent could not recover against appellant unless appellant was guilty of gross negligence, which is something more than ordinary negligence. How then can it be said that it was sufficient to charge only ordinary negligence? If this were the rule it would lead to endless confusion. A complaint alleging that the plaintiff was a guest and charging the defendant with ordinary negligence would then be sufficient, yet the plaintiff would be required to go beyond the allegations of the complaint in the proof. Furthermore, findings that all the allegations of such complaint were true would be insufficient to sustain a judgment under the guest statute, but the findings would have to go beyond the pleadings and embrace a finding of gross negligence. In the event of a trial by jury, it would be necessary for the court to instruct the jury that no verdict could be returned in favor of plaintiff upon proof of ordinary negligence as alleged in the complaint, but that such verdict could only be returned in the event that the jury found that the defendant was guilty of gross negligence.
>
> "In support of her position that the usual allegations of negligence constituted a sufficient averment of gross negligence, respondent relies upon the *dictum* found in the opinion of this court in Malone v. Clemow, 111 Cal. App. 13 (295 Pac. 70). The language referred to was unnecessary to the decision as may be seen from a reading of the opinion. The complaint in that case alleged that the defendant

'drove, operated and controlled said automobile in a grossly negligent manner' and the specific acts relied upon were set forth. Respondent also cites Castro v. Singh, 131 Cal. App. 106 (21 Pac. (2d) 169). The portion of the opinion relied upon was based solely on the *dictum* in Malone v. Clemow, *supra,* but there again we do not believe that the language referred to was necessary to the decision. The complaint in that case, in addition to alleging that the specific act was 'negligently' done, alleged that it was 'wantonly' done. We believe that in so far as the language of said opinion indicates that the mere allegation that a defendant 'negligenlty drove' an automobile is a sufficient allegation of gross negligence under the guest statute, such language should not be followed."

Nichols v. Smith, 28 Pac. (2d) 693, 136 Cal. App. 272, at 276-277;

Nichols v. Smith, supra, has been followed in *Lombera v. Union Paving Co.,* 38 Pac. (2d) 871, 3 Cal. App. (2d) 268;

Bartlett v. Jackson, 56 Pac. (2d) 1298, 13 Cal. App. (2d) 435.

The foregoing authorities have all been before the court and the court had the benefit of them in the decision on the first trial in this matter. Subsequent to that date however, the case of *Donnelly v. So. Pac. Co.,* 18 Cal. (2d) 863, was decided, which clarified the law on the subject of gross negligence and the subject of wanton and reckless misconduct is distinguished from negligence. We are happy to have this decision available inasmuch as it amplifies by court decision the extent to which the release from liability goes in this case. The gross negligence from which such a release would not be effective

would have to be of the wanton and reckless misconduct type instead of the mere epithet type referred to in the *Donnelly* case. This is in substance the same rule as exists at common law. The basis of the invalidity of a release from negligence, is that it violates public policy, and a man cannot contract against his wrongful act, but the type of wrongful act referred to in those cases where public policy is infringed upon, is of a wanton and reckless type or an intentional and wilful type. The federal rule follows the wanton and reckless definition.

> "Some jurisdictions, including California, distinguish between ordinary and gross negligence. (Kastel v. Stieber, 215 Cal. 37 (8 Pac. (2d) 474); Albers v. Shell Co. of Calif., 104 Cal. App. 733 (286 Pac. 752); Walther v. Southern Pacific Co., 159 Cal. 769 (116 Pac. 51, 37 L.R.A. (N.S.) 235); see 6 So. Cal. L. Rev. 91, 127.) This distinction amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations. (See Walther v. Southern Pacific Co., *supra.*) The federal rule, however, clearly recognizes the validity of a release from liability for negligence, including what in California would constitute gross negligence, and holds such a release inapplicable only in the case of wanton and reckless misconduct as distinguished from negligence.
>
> "In the present case the alleged conduct of the switchman does not constitute wanton and reckless misconduct. There is no allegation that he intended to throw the switch the wrong way. Apparently, he did not know he was throwing the switch the wrong

way and that harm would probably result. He was guilty of negligence alone. This negligence may have been 'gross' under the California rule, but the federal cases are clear that such dereliction constitutes negligence and not wanton and reckless misconduct. 'It would be going a great way to say that the failure of the switch tender to throw the switch so that the train would go on the main line was a wanton and malicious neglect. The only thing that can be said is that some one was careless, and that is admitted.' (Shelton v. Canadian Northern Ry. Co., 189 Fed. 153, 160; see Milwaukee & St. Paul Ry. Co. v. Arms, supra.) There is therefore no basis for a finding of reckless and wanton misconduct."

Donnelly v. Southern Pacific Co., 118 Pac. (2d) 465; 18 Cal. (2d) 863, at 871, 872.

Even a casual scrutiny of the evidence in the instant case conclusively establishes the total absence of the wanton, wilful, or intentional factor, and even if the plaintiff proves what is known as the epithet type of gross negligence (which she by no means did), our release clause would still be effective as to that.

This rule is set forth in a number of decisions of the federal courts and we refer in particular to the case of *Westre v. Chicago, Milwaukee & St. Paul Ry. Co.,* 2 Fed. (2d) 227, in which a release clause similar to that in the case at bar was contained in a lease between the railroad company and the plaintiff. Under this clause the railroad company was relieved of any liability for its negligence. The court upheld the validity of this clause, stated that there would be no liability for either ordinary or gross negligence and held that the only thing for which the

railroad company would be liable would be its wilful and wanton misconduct.

The facts in this case were much stronger than those in the case at bar in that there was evidence of knowledge of conditions on the part of the defendant railroad company which might lead to a conclusion of conduct amounting to something more than negligence, but the court still held that there was no evidence of any conduct upon the part of the railroad company which would be of sufficient strength to take the case out of the negligence release clause.

We most earnestly assert, therefore, that under the rule announced in the two last cited cases there would be no liability whatever in the case at bar upon the part of the appellants except upon a showing of some act or omission amounting to wilful misconduct on their part.

In conformity with the foregoing law on the subject of gross negligence, appellants submit their instructions Nos. 9-a, 32 and 33 which were refused by the court. The instructions referred to are as follows:

> "The elemental idea of 'negligence' is failure or omission—the failure or omission to do something which should have been done. Negligence that is 'gross' involves the additional and affirmative element of intent to do or wilfulness with which is done the negligent act. Gross negligence is defined to be the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of wilfulness and wantonness." (Appellants' Instruction 9-a.)

"Unless you find that the defendants were guilty of wanton and reckless misconduct as distinguished from negligence, you are instructed that the release in the contract of the parties hereto releasing the defendants from liability for negligence, is a full and complete discharge of any and all liability claimed by plaintiff of defendants in this matter. You are further instructed that unless you find the defendants guilty of wanton and reckless misconduct, you will find for the defendants in this case." (Appellants' Instruction 32.)

" 'Wilful and wanton misconduct' is such conduct as amounts to an intentional wrong or of such a reckless character as shows that the person or persons guilty of such misconduct were at the time acting in such a manner as shows that they had an utter disregard for the safety of other persons." (Appellants' Instruction 33.)

That the foregoing are proper definitions of the law of gross negligence and should have been given appears from *Donnelly v. Southern Pac. Co.,* 118 Pac. (2d) 465, 18 Cal. (2d) 863; *Russell v. Cleveland,*.....N. E....., 169 Ill. App. 149; *Seelig v. First Nat'l Bank,* (District Court, Ill.) 20 Fed. Supp. 61, 68.

In the light of the foregoing, the court should have given said instructions, and failing to do so should have granted a directed verdict, or failing that should have granted appellants' motion for judgment *non obstante veredicto* and the motion for a new trial.

(b) Review of the Facts Showing There Was No Evidence to Support the Verdict

There is no evidence whatsoever in the record in this case to establish gross negligence required to entitle the plaintiff to a recovery. Miss Olvera alone claims to have seen and to know what happened at the instant she fell —and this notwithstanding she was performing her act at the time. All her testimony on that subject appears in the following pages of the printed transcript: [Pr. Tr. pp. 175 to 233]. There was nothing broken on the trapeze. [Pltf. Ex. 2, Pr. Tr. p. 469, lines 21-28; p. 593.]

Philip LeBay is the only witness who looked at the crane bar prior to Miss Olvera's fall. He testified that the figure eight hook was placed before the act and not tangled up. He was the only person, Miss Olvera included, who looked at the crane bar prior to Miss Olvera's commencing the actual performance of her act, and his testimony on this subject is uncontradicted and he said at that time the figure eight hook and the crane bar hook were in place. [Pr. Tr. p. 467, line 1, to p. 469, line 31.]

The contention of the plaintiff in this case is that the defendants were guilty of *gross* negligence in the maintenance of two items of equipment: (1) the erection of the apparatus upon which Olvera performed, and (2) the management and operation of the net in which she should have fallen. In dealing with the testimony on these matters we will primarily direct the Court's attention solely to the testimony of Miss Olvera, for on that there could have been no conflict resolved by the jury, and we must therefore take that testimony as the best possible case she could have offered.

She herself was confused as to what took place. First she said that she saw the figure eight hook actually in the process of overlapping when she looked up at the instant of the peak of her swing just before her fall. [Pr. Tr. pp. 175, lines 19-31.] Later she said that she did not know when the hook overlapped. [Pr. Tr. p. 215, lines 9-12.] Still later she attempted to leave the inference, although she did not know that fact, that the eight hook had become tangled up when the trapeze was erected. [Pr. Tr. pp. 226-227.] Only the showmanship and glamour that enabled her to hold the attention of more than 10,000 persons at a performance in the big top enabled her to get by with such inconsistency. She was very clear on the fact that the lower trapeze bar swung evenly when she swung forward and back on it and did not swing further out to one side than to the other when she swung sideways on it. If the figure eight hook was overlapped as she stated, from 5 to 6 inches, shortening of the fall line would occur and this would raise the lower trapeze bar. She testified it was level, however, and that she saw it was level when she came into the ring, and indeed she could not have performed at all if it had been in the slightest off level. [Pr. Tr. p. 221, line 23, to p. 222, line 10.]

In any event, if the figure eight hook was tangled up, the fall line on that side would be shorter than the fall line on the other and it is a matter of mathematical or physical calculation that when she swung forward and back the side with the longer line would swing out slightly ahead of the other side. The reason for this is that the arc or portion of circle described by a certain radius will be longer than that described by a shorter radius, and over a swing of eight or more feet forward and back

and eight or more feet sideways, this discrepancy would become very apparent, especially to a trained performer. She testified that there was no variance in the swings. [Pr. Tr. p. 222, line 1; p. 224, line 31.] She testified that she would have noticed it had there been even so much as one inch. [Pr. Tr. p. 224, lines 6-10.] This leads us to an inescapable conclusion that the hook was not overlapped and to the obvious absolute impossibility of her story concerning that matter.

Carrying her testimony a little further we observe that on cross-examination when pressed by counsel to explain what had compensated for the difference in the length of the two fall lines in order to make the lower trapeze bar level, she attempted to explain away the situation by finding the hook holding the clevis on the crane bar likewise out of place, and at that time she cupped her hand to indicate that the clevis was actually hooked up on the upper portion of the hook rather than in the socket thereof; [Pr. Tr. p. 225, line 22; p. 226, line 3] that just at the instant of the fall it slipped down and at the same time the eight hook slipped down. She made two obvious conclusive errors in this statement: (1) to have placed the clevis higher in the crane bar hook would have only accentuated and made still shorter the already shortened fall line on that side, and (2) for that to have occurred on the same side as the tangled up eight hook would likewise contribute to the same result. She could not place this tangled condition on the other side of the trapeze because of the absolutely fantastic nature of the claim that she could look at both those places, so far apart from each other, at the same instant. That group of facts, coupled together, make impossbile as a physical fact the

story respecting the tangled condition of the eight hook. She admitted the erection of the equipment in the same manner as it had been erected on previous occasions and the eight hook had never become tangled [Pr. Tr. p. 216, lines 24-31], and numerous other witnesses so testified. [Pr. Tr. p. 442, lines 22-31.]

In order to shift the responsibility at common law, and in this case under the contract relating to inspection, she claimed that neither she nor her husband, whose negligent act as a member of the community would have been imputed to her, participated in the erection of the trapeze, inferring that they were prohibited by the exigencies of time in the performance of her act from so doing. The testimony of all other witnesses other than she and her husband, was contrary to this [Pr. Tr. p. 514, line 22, to p. 515, line 8; p. 466, line 15, and p. 467, line 11; p. 588, lines 21-26], and in fact it was actually admitted that he participated to the extent of pulling her up and certain other phases of her act. [Pr. Tr. pp. 196, 197, 182, 255.] The testimony of all other witnesses was to the effect that Pollinger did participate in the inspection and erection of the trapeze, and on one occasion Miss Olvera herself when offguard and questioned by a juror, and on another occasion by her own counsel, let the cat out of the bag as it were and did admit the husband's participation. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20.] If she did not inspect the apparatus it was her duty to do so and she failed in that regard and should not be permitted to recover. If Pollinger participated in the erection of the apparatus, he was a party to any negligence, if any there was, and that was imputed to Miss Olvera.

The condition of the eight hook as claimed by Miss Olvera, is rendered all the more fantastic by what had transpired prior to that in the performance of her act. Prior to the fall, she had done two out of three of her exercises [Pr. Tr. p. 172] involving many details, related in her account hereinbefore referred to and among which were ten or twelve crossettes, numerous swings backwards and forward on an arc of about 14 feet, sidewise on an arc of about 8 feet, and a whirl or windup and unwind of the side line or ropes supporting the trapeze. At the end of all this, and almost at the end of her act, she looked up, saw the eight hook and the clevis hook on the crane bar disarranged, which at that instant snapped down, causing one side of her trapeze to be lower by three and one-half inches than the other. She lost her balance and fell from the trapeze. The cross-examination conclusively establishes this to be impossible. [Pr. Tr. pp. 213-227.]

Coming to the second claim of gross negligence, we find the following condition prevailing: She was using a net in the exact form, style and size designated by her [Pr. Tr. pp. 163-163, 2101, lines 16-31], operated in identically the place and in the manner directed by her [Pr. Tr. p. 202, lines 2-6; p. 204, line 22; p. 205, line 14], which had all been so used for the entire circus season lasting from March until September, before that criticism or objection by her and exactly as she expected and wanted it to be done. [Pr. Tr. p. 204, line 22; p. 205, line 14; p. 208, line 23; p. 209, line 12.]

So far then, there could be no negligence of any kind or character on the part of defendants. The only claim of negligence in relation to the net that she makes, is

that these eight or ten men did not move in unison the necessary distance after she began her fall, or after she began to fall, to catch her in the net. She was 22 feet above the ground in her swing. [Pr. Tr. p. 156, lines 7-11; p. 271, lines 22-23.] The net was held by the men with a thong running around the wrist and their hands clenched together, their elbows at their sides. [Pr. Tr. p. 169, lines 20-30.] This would mean that the net was approximately 3 feet off the ground and would reduce the distance from her body as she stood there in the air, to the net, to about 19 feet. It is a well known fact of physics that a falling body falls 16 feet the first second and 32 feet the second second. Miss Olvera states she fell about one foot outside the net. This would mean that these 8 or 10 men would have apparently 1.2 seconds in which to appreciate or understand what was happening and move in unison a distance of at least one foot and probably as much as 3 feet, in order to catch her in the net.

> "As the court said in Goodson vs. Schwandt, 300 S. W. 796, quoting from Rollison vs. Railway, 160 S. W. 994: 'To predicate negligence on two seconds of time is in and of itself a monumental refinement. We cannot adjudicate negligence on such pulsebeats and hair-splitting, such airy nothings of surmise.'"
>
> *Hamilton v. Finch* (Ore.) 109 Pac. (2d) 852.

> "Simple calculations based upon these data (speed and feet) indicate that the defendant had at the most not over two seconds in which to act after he became aware of the danger. The New Hampshire cases establish that in such a short interval of time there is opportunity only for instinctive action, and that such action, without proof of unfitness to act in

an emergency, does not provide a basis for a finding of negligence."

Whicher v. Phinney, 124 Fed. (2d) 929.

This was the first time such a thing had occurred and they were exactly in the place where they had been directed to be.

Especially having in mind the fact that different individuals react differently when presented by sudden peril or a sudden exigency, recognized in law as the sudden peril rule, can it conceivably be claimed that these two defendant circuses were guilty of *gross* negligence for the failure of these men to catch her in that net, under those circumstances. We do not believe many, if any individuals, could have accomplished that feat in so short a period of time with rehearsal, much less without it. We are convniced that it would not be humanly possible for 8 or 10 men so to act. Even if it were, they would not be guilty of gross negligence in failing so to act.

Are these defendants to be held liable—plastered with the label of gross negligence amounting to wilful misconduct, for an accident of this sort? And where they had never done a thing wrong in the management of the apparatus in more than six months of daily performances for the whole season before? And where nothing has been left for such a surmise, inference or speculation? [Pr. Tr. pp. 201-209, 216-227.]

(c) The Plaintiff's Claim Is Too Improbable to Be Worthy of Any Consideration and Is Contradicted by the Physical Facts.

The only evidence concerning the trapeze before the actual accident took place was that it hung normally and that there was nothing outside of the ordinary respecting

the manner in which it hung or was erected. [Pr. Tr. p. 467, line 1, to p. 469, line 31; pp. 402, 403, 437, 515, 536, 538, 593.]

The plaintiff made much of an inference attempted by the fact that as she fell the one side of the trapeze was lower or hung down lower than the other side. The testimony on this subject was that this appeared shortly after the accident. Nowhere does it appear that it was lower at the exact instant that Olvera fell. [Pr. Tr. pp. 297, 312, 441, 469, 470.] Lysaught testified that he dropped the rigging immediately. [Pr. Tr. pp. 367, line 27 to 368, line 5.] Cronin and Valdo testified that it was level immediately after the plaintiff fell. [Pr. Tr. pp. 480, 293, 402, line 23, and 403, line 3] and such was likewise the testimony of other witnesses. What no doubt occurred was exactly what occurs whenever an accident takes place in the circus, or in fact whenever an act is over;—the workmen rush to their places and remove the equipment immediately and in doing so one crew might let their side down a little before the other side had slacked off their ropes. Consequently, one side of the trapeze did hang down slightly after the accident. In the light of Olvera's testimony that she went through her entire act without anything out of the ordinary appearing or happening regarding the trapeze [Pr. Tr. pp. 226-227], and that she looked up and saw the hook overlapping at the instant she fell [Pr. Tr. p. 175, lines 19-31], this fact is conclusively confirmed and makes her claim so improbable and in fact impossible, as not to be worthy of consideration or support. That the appellate court may reverse a case upon facts so inherently improbable or amounting to a mere scintilla of evidence, as

not to have been worthy of serious consideration, is well settled.

Herbert v. Lankershim Estate, 71 Pac. (2d) 229; 9 Cal. (2d) 409.

"It is an accepted rule that if the evidence presented by a party is positively contradicted by the physical facts, neither the court nor the jury is permitted to give it credence."

Galloway v. U. S., 130 Fed. (2d) 467;

Brady v. So. R., 64 Sup. Ct. Rep. 234.

So far, we have scrupulously taken testimony and evidence from the plaintiff's story alone in deference to the rule of resolving disputes of fact in favor of the appellee. The impossibility of this fall being the result of negligence on the part of the appellants has been established by a review of that evidence, but we still search our minds for the question of what actually did happen as the final clincher on such a thought. It is common knowledge, and the evidence abundantly shows, that Olvera and other trapeze artists frequently fall both in practice and in performance. Olvera herself did so and was amply protected by nets or other safety devices against the hazard of such fall, especially when she was practicing. Her business was admittedly and contracturally a hazardous one. Such falls occur where there are no defects in the apparatus, and what actually happened in this case was that the plaintiff, when making a "style" at the end of one of her giant swings, over-did it slightly in emphasizing her performance to Pat Valdo, the talent scout for Ringling Brothers, and fell out of the front of her trapeze.

POINT II.

The So-Called Plaintiff's Instruction 14-A Given by the Court, Was Erroneous in That It Was a Formula Instruction Omitting Defenses Pleaded and Abrogating Contractual Rights of the Parties, and Was Incoherent and Unintelligible.

The Court of its own motion redrew plaintiff's Instruction No. 14 and then gave it as plaintiff's Instruction No. 14-a, reading as follows:

> "If you find that the injuries sustained by plaintiff, if any, proximately resulting from her fall were not caused solely by ordinary negligence, if any there was on the part of defendant Al G. Barnes Amusement Company, or that such injuries, if any, were not the result of an unavoidable accident or of the risks incident to the act which she had contracted to perform, and if you find from a preponderance of the evidence that said defendant assumed and undertook to erect and place in position the trapeze to be used by plaintiff in performance of her act, without supervision or inspection by plaintiff, and that without the aid or supervision or inspection on the part of plaintiff or of any person acting in her behalf, said defendant at Anthony, Kansas, on the 12th day of September, 1937, did erect and place in position plaintiff's trapeze, and that this was so done in a grossly negligent manner, and that as a proximate result of such gross negligence plaintiff fell from her trapeze and was injured, or if you find by such preponderance of the evidence that said defendant undertook to and did provide a net and persons to maintain and operate it, for the purpose of catching plaintiff in safety in the

event of her falling from the trapeze in performing her act, and that said defendant's employees so operated said net in a grossly negligent manner that they failed to catch plaintiff when she fell and that as a proximate result of such failure she struck the ground and was injured, and if you further find by such preponderance of evidence that such gross negligence, if any there was, either in the erection and placing in position of said trapeze or in the maintenance and operation of said net, was the proximate cause of plaintiff's injuries, and that plaintiff herself was not guilty of negligence which proximately contributed thereto, then plaintiff is entitled to recover against said defendant Al G. Barnes Amusement Company.

If you further find that the said Al G. Barnes Amusement Company was then and there under the management and ownership of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, you may also return your verdict for the plaintiff and against Ringling Brothers-Barnum & Bailey Combined Shows." [Pr. Tr. p. 703, line 5, to p. 704, line 13.]

The privilege of examining this redraft was not afforded to the defendants until long after the jury had retired to the jury room. [Pr. Tr. pp. 719-720.] Their first hearing of this instruction occurred when the court read it to the jury. We have no quarrel with the right of a court to instruct a jury in conformity with the law, but in this case such conduct prohibited the defendants from

their right to present counter instructions or to alter their theory of the case and from their rights to present timely and proper objections. This instruction is erroneous in several respects and constituted prejudicial error.

(1) It is divided into two sections, the first, approximately one-half thereof, dealing with the subject of the apparatus and the second one-half thereof dealing with the subject of the net. In the first one-half thereof the use of the word "or" in line 6 thereof [Pr. Tr. p. 56], makes it in the alternative instead of the conjunctive and thus eliminates other pleaded defenses. In other words, this is equivalent to instructing the jury that if the injury were not the result of an unavoidable accident, and if the defendants constructed the trapeze in a grossly negligent manner which proximately resulted in the accident, the plaintiff could recover. It being a formula instruction, this violates the law requiring the full statement of all phases of defense in a formula instruction.

Mazotta v. L. A. Ry. Co., (Cal. 1944), ... Pac. (2d) ....., 25 A. C. 163;

Bee v. Tungsten Corp., 151 Pac. (2d) 53, 65 A. C. A. 1009.

(2) The second section of this instruction violates all of the law of this case inasmuch as it directs a verdict in the event of the failure of defendants to catch plaintiff in safety when she fell. This is not the duty of defendants in this case. The duty is to refrain from gross negligence. As a matter of fact, we contend and have heretofore argued, that the type of gross negligence in-

volved is what amounts to wilful misconduct under the California rule. It is our contention and belief that gross negligence as defined under the California statute—the epithet type of gross negligence—is itself eliminated by the contract of the parties in this case.

> *Donnelley v. So. Pac.,* 118 Pac. (2d) 465; 18 Cal. (2d) 863.

The giving of the instruction referred to in effect directed a verdict for the plaintiff no matter what negligence or lack of negligence was proven in the event the jury found alone the fact that defendants failed to catch the plaintiff in safety.

(3) This instruction had the additional vice of re-opening the case on ordinary negligence. Heretofore, on representations and statements that the case was to be tried on the theory of gross negligence and on the theory of independent contractor, defendants withdrew certain instructions on the fellow servant rule. [Pr. Tr. pp. 105-110.] This instruction in effect directed that there was a modification of the contract pulling the net phase out of the exemption clause in the contract against negligence. This reopened the case on ordinary negligence in violation of the law of this very case and that effect was achieved through the giving of instruction 14-a. This was particularly vicious so far as defendants and appellants were concerned when we consider that the court gave that instruction to the jury as it was about to retire and that no copy thereof was provided counsel for defendants until after the jury had retired, thus

no opportunity was afforded to reoffer master and servant instructions. Fortunately for the state of the record, defendants as an excess of caution, had left three master and servant instructions in the record, being Instructions 10, 21 and 33. [Pr. Tr. pp. 67-68, 70-71, and 77.]

In the light of the interpretation the Court placed upon this trial by his Instruction 14-a, the Court erred in refusing those instructions.

There was abundant evidence that the injury in this case was the result of negligence, if any, of a fellow servant. [Pr. Tr. pp. 511-512, p. 588, line 20; p. 591, line 17; pp. 437-439; 556-560; 466, 200-227.] Pollinger himself was a participant in the erection of the trapeze and there was evidence on this subject from the plaintiff's own lips. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20] and abundantly from the testimony of other unbiased witnesses—fellow servants. In fact, the whole affair was the result of actions of fellow servants if the master and servant doctrine was permitted to be applied. If the use of this net and its operation by show employees was a modification of the contract of the parties hereto, it brought into play (1) the fellow servant rule and (2) contributory negligence as a matter of law by the plaintiff and her husband, in either (a) their failure to inspect and direct the erection and maintenance of equipment [Pr. Tr. p. 221; 212, lines 9-27; 160, lines 12-14] or, (b) their negligence in doing so. [Pr. Tr. p. 156, lines 20-22; p. 160, lines 19-20; 511-512; 588, line 20; 591, line 17; 437-439; 550-560; 466.]

POINT III.

INDEPENDENT CONTRACTOR.

Where the Relation of Independent Contractor and Contractee Exists Between the Parties, the Duty Owed by Contractee to the Contractor Is No Greater Than That Owed by an Invitor to an Invitee in Regard to Premises, and Where It Is the Duty of the Contractor to Furnish, Maintain and Inspect the Appliances Used, the Contractee Owes No Duty to the Contractor in Relation to Appliances Other Than to Refrain From Wilful Injury.

We agreed to this state of facts [Pr. Tr. p. 153, lines 9-12], although it precluded defendants from using other defenses recognized by the law of Kansas (*locus delicti*), relating to master and servant or employer and employee, such as the "fellow servant" rule. While in its broad sense the contractee may be an employer, it is universally held that the relation and duties of a master to a servant or employee, or employer to employee, cannot exist between independent contractor and contractee.

Pottorff v. Fidelity Coal Mining Co., 86 Kan. 774; 122 Pac. 120;

Browning v. Allvine Dairy Co., 19 Pac. (2d) 474; 137 Kan. 209.

Many other legal relations more nearly approximate the relationship in the duties of each to the other of independent contractor and contractee, than that of master and servant. We mention invitor and invitee, landlord and tenant, bailor and bailee, charterer and shipowner, as well known examples.

However, the contractee does owe a duty to the contractor and it approximates the duty an invitor owes to an invitee as to premises, similar to the duty a landlord owes his tenant or a shipowner owes to a charterer.

In regard to the premises, the contractee owes a duty to a contractor invited to work thereon to notify the contractor or invitee of any hidden or latent dangers known or which should have been known to the contractee or invitor and not known if not obvious or could not have been ascertained by the contractor by the exercise of ordinary care and prudence. This rule is well settled in California, as follows:

> "If this was a case were there existed a latent or hidden defect in the walls fraught with danger to those working or being about and near the walls, or a dangerous defect other than that which was obvious to any person of common intelligence or sense, and of which defect the defendants had knowledge but of which neither the contractors nor the deceased were aware at the time they entered upon the work of removing the junk and debris from the premises, it would undoubtedly have been the duty of the defendants to warn the contractors or the deceased of the added danger following from such latent defect, and failure on their part to do so in such case might justly subject them to liability for any damage resulting from such defect."
>
> *Brown v. Board of Trustees,* 41 Cal. App. 100 at 107, 182 Pac. 316.

> "The only duty owing by the defendant to plaintiff as an independent contractor was that of exercising reasonable care to promote his safety. Plaintiff was an invitee and it was defendant's duty to warn him of any danger in and about the premises

which he knew or in the exercise of ordinary care ought to have known, and of which plaintiff was not aware or which in the exercise of ordinary care on his part would not have been discovered."

Gowing v. Henry Field, 281 N. W. 281; 225 Iowa 729.

While most of the cases brought by an independent contractor against his contractee in actions for negligence relate to safe or unsafe premises, or safe or unsafe place to work, it will be remembered that in the instant case no question of the safety of premises is involved. The only question here is gross negligence relating to the erection of appliances used by plaintiff and owned and controlled by plaintiff, to-wit, the trapeze, rigging or apparatus, and gross negligence in the operation of a net. The plaintiff strenuously urged at the trial that the net was a part of her apparatus or equipment. [Pr. Tr. p. 163.] This contention was made in meeting defendants' objection that no negligence concerning a net was pleaded. [Pr. Tr. pp. 163, 169.] It is submitted if the net were a part of the apparatus or equipment used by plaintiff, the net would fall within the provisions of the contract relating to plaintiff's duty to furnish and maintain the equipment. This is clear from the following provisions in the contract:

"The artist shall furnish and maintain in first class condition, at his expense, all paraphernalia and equipment. The artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The artist assumes exclusive supervision regarding inspection

> of the act and premises, and agrees to keep the premises safe, and warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same."

That this portion of the covenant on the part of plaintiff to be performed was not waived in any manner by the defendant, is shown by that portion of paragraph 2 of the written agreement which is set out on page 3 of plaintiff's amended complaint, beginning with line 25, as follows:

> "It is definitely understood by both parties that any changes that may from time to time be made, either in props, apparatus or personnel in the act, time of giving the act, etc., are changes exclusively under control of and for the convenience of the artist, and in no particular modify or restrict the artist's relations with the show as an independent contractor . . ."

Instructions concerning the net or appartus used, safe place to work, or safe appliances, and the duty of the master to furnish same, had no application to the facts of this case under the contract of employment heretofore referred to, for the reason that the master does not owe any duty to furnish safe appliances or safe place to work where the appliances are furnished by the servant herself.

Callan v. Bull, 113 Cal. 593 at 603; 45 Pac. 1017.

> "The rule which requires the master to provide a safe place and safe appliances for the servant, is applied when the place in which the work to be done is furnished or prepared by the master, as in the case of a ship, or a mill, or a factory, or when the machine or other appliance with which the servant is

employed to work are furnished by the master; *but it has no application when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself.*" (Italics ours.)

Peterson v. Beck, 27 Cal. App. 571; 150 Pac. 788, approving, citing and holding with the rule stated in *Callan v. Bull, supra.*

"The rule requiring the master to provide a safe place for the servant, does not apply when the place at which the work is to be done or the appliances for doing the same are to be prepared by the servant himself."

Albert v. McKay & Co., 174 Cal. 451 at 455; 163 Pac. 666;

Carolan v. S. P. Ry. Co., 84 Fed. 84 at 87;

Sowles v. Norcross Bros. Co., 195 Fed. 889 at 892.

It will be again noted that these quotations contain citation of cases relating to master and servant, but we again submit if the rule of law announced in said cases applied to a servant, they would apply with even greater force to an independent contractor.

Especially would this be so where there was a contractual obligation on the part of the contractor to furnish, inspect and maintain all her appliances and equipment.

It is also submitted that no suggestion was ever made, either by pleading or proof, that the defendants had ever exercised any control over plaintiff in her work sufficient to change the contractual relationship.

Judge Cosgrave on June 26, 1939, in denying defendants' motion to dismiss, intimated that plaintiff had

pleaded, although improperly, a change in the agreement "as may amount to an executed oral agreement," and was entitled to a hearing. [Pr. Tr. p. 14.] After the hearing the trial court properly and conclusively decided this point in his instructions to the jury, as follows:

> "You are instructed that the evidence shown is conclusive that at the time of the accident in question the plaintiff, America Olvera, was performing duties assumed by her under her written contract with the defendant Ringling Brothers-Barnum & Bailey Combined Shows, Inc., *and no other;* that said written contract is free from ambiguities and clear in its terms and the court finds that the relationship created by said written contract is one of 'independent contractor' on the part of plaintiff, and 'contractee' on the part of the defendant Ringling Brothers-Barnum & Bailey Combined Shows, Inc." (Italics ours.) [Pr. Tr. pp. 706-707.]

We submit that plaintiff was bound by the terms of her original contract, *and no other,* as an independent contractor.

We further submit and challenge the appellee to cite any recognized authority showing facts where an independent contractor recovered damages for injuries caused by unsafe premises, unless said injuries were caused by some latent defects known only to the contractee and not known and could not have been known to the contractor by the use of reasonable prudence. We further challenge appellee to cite any recognized authority holding an independent contractor could recover damages for injuries

caused by defects, latent or obvious, in appliances, apparatus or equipment where it was the contractual duty of such independent contractor to furnish and inspect such appliances.

The argument contended for in this paragraph becomes all the more cogent and impelling when we consider that the claim of gross negligence in this case is based (1) upon the maladjustment of a figure eight hook or clevis, or both, under extremely uncertain and doubtful conditions, conditions, which indicate that it probably actually became disarranged during the process of Olvera's act and through her own exertions on the trapeze, and (2) concerning the moving of a net in the matter of approximately one and one-tenth seconds by eight or ten men confronted by a situation of imminent peril. Is this Court willing to determine that either one of such claims is a peril or danger of which the defendants knew, or ought to have known beforehand, that the failure so to do was so extreme as to constitute gross rather than ordinary negligence? How could such an application of the law be reconciled with the doctrine of independent contractor? To do so to our minds would in effect obliterate the doctrine of imminent peril and establish something new and different in the law, such as a *res ipsa loquitur* of gross negligence.

The District Court also erred in refusing to give instructions requested by appellants defining the duty of appellee under her contract to inspect and supervise the erection of her apparatus.

POINT IV.

ASSUMPTION OF RISK.

Where Employees of the Contractee Assisted the Independent Contractor in Arranging Her Apparatus Prior to Her Performance on Same, Any Plain and Obvious Defects in the Arrangement of the Apparatus Should Have Been Observed and Appreciated by the Independent Contractor Under Her Contractual Duty of Inspection Where Independent Contractor Could Qualify as an Expert in Such Matters, and Any Defect Such as Claimed by Plaintiff Should Have Been Observed, and the Court Erred in Refusing to Give the Defendants' Requested Instruction on This Point.

The question of "assumption of risk" as a defense in this case is controlled by the law of Kansas; Kansas being stipulated as the *"locus delicti."* [Pr. Tr. p. 2.] We believe this principle of law so well settled that we shall devote but little space thereto.

> "All matters of defense to an action, such as the fellow servant rule, contributory negligence, assumption of risk, etc., are to be determined in accordance with the *'lex loci delicti.'"*
>
> 5 R.C.L. 1044, Sec. 135, Note 9.

And again this rule is stated in Restatement of the Law, subject Conflict of Laws, sections 385 and 386, as follows:

> "Whether contributory negligence of the plaintiff precludes recovery in whole or in part in an action for negligent injury, is determined by the law of the place of wrong."
>
> *Restatement of the Law, Conflict of Laws,* Sec. 385, p. 470.

"The law of the place of wrong determines whether a master is liable in tort to a servant for a wrong caused by a fellow servant."

Restatement of the Law, Conflict of Laws, p. 472.

"It is the well settled law in the United States that an action in tort is governed by the law of the jurisdiction where the tort was committed."

Loranger v. Nadeau, 215 Cal. 362, 10 Pac. (2d) 63.

To same effect:

Poole v. Day, 40 Pac. (2d) 396, 141 Kan. 195;

Keane Wonder Mining Co. v. Cunningham, 222 Fed. 821.

Any question of implied assumption of risk in this case is obviated, due to the actual contractual assumption of risk of the plaintiff, independent contractor, in the contract. [Contract, paragraphs, 8-12, Pr. Tr. pp. 7, 8 and 9.]

The law of Kansas, *"locus delicti"* has always recognized the defense of assumption of risk in cases of negligence involving master and servant and since the adoption of a modified form of workmen's compensation law Kansas recognizes such defenses in all cases between master and servant where the parties are not within the terms of the Act, except where injury is caused by wilful negligence of the employer.

Kansas Workmen's Compensation Act, General Laws of Kansas, Sec. 44.505, p. 1052; Sec. 44.507, p. 1054; Sec. 44.543, p. 1069; Sec. 44.545, p. 1070.

As neither the plaintiff nor defendants in this case were entitled to come within the provisions of said Act, said Act would not apply and reference thereto is only offered to show that the defense of assumption of risk would apply as between contractor and contractee to an even greater extent than between master and servant, especially where the assumption is not implied but contractual.

It will be noted that in the contractual assumption of risk as set out in paragraphs 8 and 12 of the contract in suit, that besides the general duty of inspection and assumption generally of all risks, paragraph 12 contains the following clause:

> "Artist for himself and the personnel of his troupes, accepts all risks incident to the business." [Pr. Tr. p. 8.]

The artist's business in this case was a trapeze performer, and it is submitted that the erection of her trapeze was an incident to performing on said trapeze and there would of necessity be risks incident to an erection of the trapeze, such as loose guy wires, kinked chains or hooks, trapeze bars uneven and unlevel, and a risk due to a failure in the operation of the net in catching the artist in the event of a fall. Direct supervision and inspection of both the trapeze apparatus and the net was also assumed by the artist-plaintiff, in the following words:

> "Artist assumes exclusive supervision regarding the inspection of the act and premises, and agrees to keep the premises safe, warrants that all persons

appearing or practicing in the act are conversant with and suitably fitted for same." [Contract, par. 8, Pr. Tr. p. 7.]

It will be remembered also that the artist-plaintiff in this case was an expert, as a trapeze performer of 25 years' experience, of mature age, and one of the leading exponents of her art, and that she had similar accidents before. [Pr. Tr. pp. 147-151.] And any defect, such as an overlapped chain or hooked guy rope or wires, uneven or unlevel bars or misplaced net, would be obvious to her at a glance and yet she testified that she operated the trapeze for almost the full length of her act and only noticed an overlapped hook at the time of her fall. [Pr. Tr. p. 175, lines 18-31; p. 212, lines 19-25.]

The most charitable thing that can be said of her story is that it is "inherently improbable," but if probable, and the jury, if it did not decide the case on the net, evidently believed it was, even as an employee or servant and without a contractual agreement she would have assumed the risk impliedly under the law of Kansas. And she, being under a contractual bargain to assume such risk as an independent contractor, would be held to have assumed the risk under the law of any place not covered by special statute.

The law of Kansas as to assumption of risk by an employee may be tersely stated as follows:

Under ordinary employment contract, in absence of agreement to the contrary, servant assumes risk ordinarily or obviously incident to employment.

Hunter v. Barnsdall Ref. Co., 268 Pac. 86, 126 Kan. 277.

"The test is commonly said to be whether the facts and danger are as fully within the knowledge and appreciation of the employee as of the employer. . . . He (servant) must be deemed to appreciate the danger if it is one that is perfectly obvious to a person of his intelligence from the known facts. If through momentary forgetfulness he fails to act upon the knowledge that he has, this does not avoid the defense of assumption of risk."

Barnes v. Akins, 166 Pac. 474, 101 Kan. 359.

"Assumption of risk can be declared as a matter of law where an employee sees the danger, knows what its consequences may be and continues his work with that danger confronting him. Assumption of risk cannot be declared as a matter of law unless the employee knows or should know what the danger is and knowing that danger, continues in the performance of his labor."

Tartar v. Mo. K. & T. Co., 241 Pac. 246, 119 Kan. 738.

"Before it can be said that an employee has assumed the risks of an employment, it must be shown that he knew or had reasonable opportunity of knowing what those risks were; that is, he must not only know or have reasonable opportunity of knowing the dangerous conditions but must know or have reasonable opportunity of knowing the danger growing out of those conditions."

Fritchman v. Chetwood Battery Co., 8 Pac. (2d) 368, 134 Kan. 727.

"The general rule is that, where the servant accepts or continues in employment, knowing or hav-

ing equal means of knowledge with the master of the defects and dangers inherent in the employment, he assumes the risk of injury therefrom."

Riverside Iron Works v. Green, 79 Kan. 588. 100 Pac. 482.

"But reduced to its last analysis, the doctrine of assumed risk must rest for its support upon the express or implied agreement of the employee that, knowing the danger to which he is exposed, he agrees to assume all responsibility for resulting injury."

A. T. & S. F. Ry. Co. v. Bancord, 71 Pac. 253; 66 Kan. 81.

We submit that the following instructions requested by the defendants and refused by the court, were erroneously refused, and that the instructions proffered correctly state the law of Kansas on the subject of assumption of risk:

Defendant's Instruction No. 8

You are instructed that the plaintiff in her contract with Ringling Brothers-Barnum & Bailey Combined Shows—accepted all risks incident to the business of her performance, and if the injuries sustained by her were the result of dangers ordinarily or obviously incident to the carrying out of her performance, then you shall find in favor of defendants. [Pr. Tr. pp. 65-66.]

Defendant's Instruction No. 20

If you find that plaintiff herein sometime prior to her accident complained to her employer concerning the defective condition or negligent inspection or lack of inspection or lack of opportunity for inspection by herself of her apparatus, and without a promise of remedy on the part of defendants, plaintiff continued in her work, and if any danger was imminent or obvious, then plaintiff assumed all risk incident thereto and can not recover from the defendants. [Pr. Tr. pp. 70-71.]

Defendant's Instruction No. 21

If you find that plaintiff herein complained sometime prior to her accident to her employers concerning the defective condition or negligent inspection or lack of inspection, or lack of opportunity for inspection by herself of her apparatus used in her act and that defendant promised to remedy the matter, and if you further find that plaintiff continued in her work an unreasonable length of time after the employer had agreed to remedy the defect complained of, she assumed all the risks and hazards incident thereto. You are the judges of what would be an unreasonable length of time under all the facts and circumstances of the case. But where a servant has full knowledge of the danger of his employment and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait and after being injured then claim damages. She should leave her dangerous employment within a reasonable time on discovery of the master's neglectful method of doing business when she finds that the master will not remedy the danger or fulfill his promise in that respect. [Pr. Tr. pp. 71-72.]

Defendant Ringling Bros-Barnum & Bailey Combined Shows, Inc., in their answer and in the sixth, separate and distinct defense, alleges as follows:

> "That at the time and place of the accident sued on herein, plaintiff as an employee of the Al G. Barnes Amusement Company, was engaged in the performance of services for said Al G. Barnes Amusement Company, as employer, and that by agreement with said Al G. Barnes Amusement Company had assumed for herself exclusively all risks incident to such employment, including the risk of the accident sued on herein, and said agreement released and discharged all of the defendants in this action of any of the claims, demands, causes of actions, damages, liabilities or things whatsoever growing out of any injury or accident to plaintiff while performing said services for defendant, Al G. Barnes Amusement Company, or for any other person or individual under and by virtue of the terms of the contract set forth in the amended complaint herein, or otherwise or at all." [Pr. Tr. pp. 34-35.]

It is again submitted the court erred in denying appellants' motion for a new trial, in denying appellants' motion to set aside verdict for appellee and to enter judgment in favor of appellants and for judgment *non obstante veredicto,* on the grounds that appellee under her contract, and as an independent contractor, assumed all risks and hazards of her employment and her act as a trapeze artist in general.

POINT V.

Contributory Negligence Was Established as a Matter of Law in This Case.

Contributory negligence was established as a matter of law in this case by the failure of the plaintiff and her husband to inspect the apparatus adequately. It appears that they did so inspect, and did not do so properly, from the testimony of the plaintiff and other witnesses. If it was otherwise and they did not inspect at all, they should have done so under the contract and their failure in that regard gave rise to their contributory negligence as a matter of law.

POINT VI.

The Verdict Deprives the Defendants of the Protection Afforded by the Constitution of the United States.

In failing to apply the contractual provision relieving defendants of liability, the trial court violated Amendments V and XIV of the Constitution of the United States and deprived the defendants of property without due process of law.

POINT VII.

In Comments and Rulings of the Court in the Presence of the Jury, a Bias and Prejudice Was Created Against Defendants Which Resulted in an Excessive Verdict.

The trial court made numerous comments during the course of the trial in the presence of the jury relating to matters before the court, which gave an impression to the jury that the court was unfavorably disposed to the defendants' case and brought in issues that should not

have been before the jury, emphasizing the plaintiff's case to her advantage. These items are quoted in Paragraph X of the Statement of Points upon which appellants intend to rely on appeal, and we refer the court to them without restating them here.

Counsel made improper statements and comments to the jury in connection with depositions and in connection with the case as a whole, which were permitted by the trial court during the course of the argument, and the instruction of the court to disregard certain of these matters as appears in the record [Pr. Tr. pp. 667-669] did not alter the effect of bias and prejudice against the defendants by reason thereof. These items are stated in the points upon which appellants intend to rely on appeal, Point VIII heretofore quoted in this brief pages 32 to 33, and we will not restate them here.

The District Court erred in allowing a purported impeachment of Chandler Miller by rambling account of counsel [Pr. Tr. pp. 649-651] and in making the comment "it is not necessary to rebut it under such circumstances."

The trial court erred in refusing the motion to strike the statement "I don't have nothing to do with it," relating to the hanging of the rigging, referred to in Point XII of Statement of Points upon which appellants intend to rely on appeal. Obviously this should have been stricken as a conclusion and it was germane and material to the case and in fact one of the main issues in the case, and it was prejudicial error to deny it.

The court erred in refusing to permit answers to the questions indicated in Point XII, part "b," of Statement of Points upon which appellants intend to rely on appeal.

All of the foregoing matters served to accentuate the bias and prejudice in favor of plaintiff on the part of the court, to contribute to the showmanship so aptly effected by the plaintiff during the course of the trial, and served in effect to place the stamp of approval by the court upon a verdict which, in this case, amounted to the full amount prayed for in the complaint. This was further emphasized to appellants' prejudice by the refusal of the court to give our instruction No. 19, reading as follows:

> "The court instructs the jury that it is their duty to consider this case in all its bearings, the same as they would a case between two private citizens. The defendant corporations are entitled to the same fair and unprejudiced treatment in courts of law as an individual would be under like circumstances. In considering and deciding this case, the jury should look solely to the evidence for the facts and to the instructions of the court for the law of the case, and find their verdict accordingly, without any reference as to who is plaintiff or who is defendant. Your verdict should not be based upon sympathy for or prejudice against any party. Star Brewing Co. v. Houck, 222 Ill. 348; 78 N. E. 827."

The plaintiff herself, traveling without a cast, of her own choice on a circus train, after having three vertebrae broken [Pr. Tr. p. 211, lines 1-8] certainly greatly accentuated and made permanent an otherwise very curable injury. [See Kersten's medical testimony, Pr. Tr. pp. 497-499.]

Conclusion.

In conclusion we submit that appellants are entitled to a reversal in this case, primarily and conclusively on the ground that the facts do not support the verdict of the jury and there are insufficient facts upon which the verdict could be based. This particularly appears from the lack of evidence in the record sustaining the so-called epithet rule of gross negligence. Facts sustaining the wilful misconduct type of gross negligence applicable in this case are obviously likewise totally absent. It further appears from the record that the court erred in giving the so-called plaintiff's instruction 14-a. This purported formula instruction leaves out several of the defenses pleaded by the defendants, in the first portion thereof, and in fact directs a verdict for the plaintiffs under any circumstances in the second portion thereof relating to the operation of the net, requiring that in the operation of the net the defendants catch the plaintiff in safety. The defendants under no circumstances violated any duty owed to the plaintiff in this case on account of the relationship of independent contractor and contractee between the parties, the duty regulative of their conduct by virtue of that relationship being in substance solely to refrain from knowingly causing harm to plaintiff. The contractural assumption of risk by the plaintiff and appellee in this case likewise relieves defendants and appellants of any liability as a matter of law and in this respect the evidence shows that the appellee herself was guilty of contributory negligence as a matter of law. To hold oth-

erwise would deprive defendants and appellants of their rights under the Constitution of the United States. Numerous errors and comments by both court and counsel during the trial and the argument contributed in this case (along with several rulings on evidence) to an excessive verdict based on bias and prejudice.

We respectfully submit that this case should be reversed without the right of new trial and that appellants take judgment against the appellee for their costs.

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